

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 13 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

AIS GMBH AACHEN INNOVATIVE  
SOLUTIONS; ABIOMED EUROPE  
GMBH,

Petitioners-Appellees,

v.

THORATEC LLC.,

Respondent-Appellant.

No. 17-16539

D.C. No. 5:16-mc-80094-EJD

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Edward J. Davila, District Judge, Presiding

In re: THORATEC LLC.,

THORATEC LLC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, SAN JOSE,

No. 17-71297

D.C. No. 5:16-mc-80094-HRL

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Respondent,

AIS GMBH AACHEN INNOVATIVE  
SOLUTIONS; ABIOMED EUROPE  
GMBH,

Real Parties in Interest.

Petition for Writ of Mandamus

Argued and Submitted December 20, 2018  
San Francisco, California

Before: CALLAHAN, N.R. SMITH, and MURGUIA, Circuit Judges.

Appellees, AIS GmbH Aachen Innovative Solutions and Abiomed Europe GmbH (collectively, Abiomed), filed an application in the district court under 28 U.S.C. § 1782 for issuance of a subpoena in aid of proceedings in a foreign tribunal. In proceedings in Germany, Abiomed sued appellant, Thoratec LLC, for infringing German and European patents relating to certain heart pumps. A magistrate judge granted the § 1782 application and ordered Thoratec to produce for inspection three samples of its heart pump. Because the magistrate judge ordered Thoratec to comply with the order prior to the district court reviewing Thoratec's challenge to it, Thoratec petitioned for a writ of mandamus and we granted a temporary stay. After the district court upheld the magistrate judge's decision, Thoratec appealed and the appeal and mandamus petition were consolidated. Whether under 28 U.S.C. § 1291 or under 28 U.S.C. § 1651, we

have jurisdiction to address Thoratec's challenge to the order compelling discovery under 28 U.S.C. § 1782.<sup>1</sup> We decline to disturb the district court's ruling.

1. "We review the district court's decision under 28 U.S.C. § 1782 for abuse of discretion." *Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th Cir. 2002). Thoratec argues that the magistrate judge's standing order deprived it of a meaningful opportunity to be heard. We disagree. Although the standing order placed significant restrictions on the briefing, Thoratec could have done more than it did. For example, Thoratec could have sought leave to file a noticed motion to quash or to file a longer joint statement or exhibits. Thoratec has not shown an abuse of discretion.

2. Thoratec argues that the district court abused its discretion in applying the factors from *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). Thoratec essentially reargues the *Intel* factors. Although Thoratec makes a rational case for denying discovery, our review—whether on appeal or by mandamus—is not de novo. District courts have "broad discretion" whether, and to what extent, to allow discovery under 28 U.S.C. § 1782, *Four Pillars*, 308 F.3d at 1078, and

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<sup>1</sup> Abiomed argues we lack appellate jurisdiction over the appeal under *In re Letters Rogatory from City of Haugesund, Norway*, 497 F.2d 378 (9th Cir. 1974). Thoratec argues *Haugesund* was wrongly decided and that it is distinguishable. There is no need, however, to revisit *Haugesund*'s holding or to determine if it applies here because—as Abiomed rightly conceded at oral argument—even if we lack jurisdiction over the appeal, we would still have the power to address Thoratec's challenge in its mandamus petition.

Thoratec has failed to show an abuse of discretion.

3. We issued an order asking the parties to be prepared to discuss at oral argument whether we should reach an issue not addressed in the parties' briefs: whether a decision on an application under 28 U.S.C. § 1782 is dispositive within the meaning of 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72. Because Thoratec did not argue this issue either in the district court or in its appellate briefs, we are satisfied that the issue has not been adequately presented for our review.

For the foregoing reasons, Thoratec has failed to show an abuse of discretion, let alone clear legal error. We thus deny the petition for writ of mandamus. *See In re Bozic*, 888 F.3d 1048, 1052 (9th Cir. 2018) ("Clear legal error is necessary . . . for issuance of the writ."). Because we deny the petition on the merits and the issues in the appeal are identical, the appeal is moot regardless of whether we have appellate jurisdiction.<sup>2</sup>

**Petition Denied; Appeal Dismissed.**

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<sup>2</sup> To be clear, if there were no mandamus petition and we had appellate jurisdiction in the appeal, we would affirm for the reasons stated in this memorandum. But there is a mandamus petition, and in denying the petition on the merits, we reject Thoratec's contentions raised in its appeal. So whether or not we have appellate jurisdiction over the appeal, the result is the same: dismissal of the appeal (either for lack of appellate jurisdiction or for mootness).